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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION**

ATLANTIC RICHFIELD COMPANY, Plaintiff, vs. GREGORY A. CHRISTIAN, et al., Defendants.	Cause No. 2:15-cv-00083-BMM-JCL PLAINTIFF ATLANTIC RICHFIELD COMPANY'S STATEMENT OF DISPUTED FACTS
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COMES NOW Plaintiff Atlantic Richfield Company ("Atlantic Richfield"),
by and through its counsel of record, and pursuant to L.R. 56.1(b), hereby submits
its Statement of Disputed Facts in response to Defendants' Motion for Summary
Judgment.

Despite this document being captioned a “Statement of Disputed Facts” in accordance with L.R. 56.1(b), and although the parties may disagree on the characterization or substance of certain immaterial facts, there are no genuinely disputed facts that are material to the issues presented to the Court by the pending motions for summary judgment, as discussed below and as already conceded by Landowners. (*See* Jt. Mot. to Vacate Pretrial Conf. (Dkt. 24) at 3.)

I. Atlantic Richfield’s Response to Landowners’ Statement of Undisputed Facts (Dkt. 35)

1. Landowners filed a lawsuit against ARCO in Montana state court on April 17, 2008, in a case captioned *Christian, et. al. v. ARCO, et. al.* ARCO’s SUF 44.

Atlantic Richfield’s Response:

Undisputed.

2. In the state court action, the Landowners have testified that the primary goal of this lawsuit is to have their properties cleaned up. Ex. 1, Depo. Excerpts (Depo. Jack Datres 108:22-109:4 (Jan. 8, 2013); Depo. Rosemary Choquette 120:7-10 (Jan. 8, 2013); Depo. Gregory Christian 90:15-25 (Jan. 28, 2013); Depo. Michelle Christian 123:14-17 (Jan. 28, 2013); Depo. Duane Colwell 96:25-97:3 (Jan. 9, 2013); Depo. Shirley Colwell 69:24-70:4 (Jan. 9, 2013); Depo. Franklin Cooney 157:21-23 (Nov. 29, 2012); Depo. Victoria Cooney 83:1-4 (Nov. 29, 2012); Depo. George Coward 105:3-7 (Nov. 28, 2012); Depo. Viola Duffy

116:4-6 (Jan. 22, 2013); Depo. Bruce Duxburry 129:13-15 (Jan. 24, 2013); Depo. Judy Minnahan 69:9-13 (Jan. 30, 2013); Depo. Linda Eggen 84:4-8 (Feb. 19, 2013); Depo. Bill Field 135:19-22 (Dec. 5, 2012); Depo. Edward Jones 128:21-24 (Dec. 5, 2012); Depo. Robert Phillips 139:5-9 (Dec. 4, 2012); Depo. Andy Gress 85:21-23 (Jan. 29, 2013); Depo. Serge Meyers 168:6-8 (Jan. 23, 2013); Depo. Toni Zimmer 61:4-8 (Nov. 30, 2012); Depo. Leonard Mann 95:10-12 (Feb. 6, 2013)).

Atlantic Richfield's Response:

Disputed. Atlantic Richfield does not dispute that some, though not all, Defendants testified that they joined the state court action with a goal of having their properties cleaned up. Atlantic Richfield also does not dispute that Defendants' experts in the state court action have represented that Defendants intend to conduct the proposed cleanup if Defendants prevail in that action. The evidence cited by Defendants, however, does not support their characterization that such cleanup is the "primary" goal of their state lawsuit. In any event, that characterization is immaterial to the issues before the Court.

3. On October 28, 2015, ARCO sent letters to twenty-four (24) Landowners, which contain proposed plans to conduct clean-up of portions of the Landowners' properties. Aff. Hoolahan, Doc. 32 at ¶ 3. The proposed remediation is scheduled to begin in the summer of 2016. *Id.* at ¶ 3; Ex. 2, Email Champoux to Slovak (3/15/2016).

Atlantic Richfield's Response:

Undisputed.

4. Landowners' retained expert in the state court action, John Kane, has proposed a plan for remediation that, he intends, will remove all of the contaminated soil from the Landowners' properties. Aff. Kane, Doc. 31 at ¶ 2. Mr. Kane also proposes the installation of a subterranean PRB wall up-gradient from their properties designed to intercept groundwater and remove arsenic from it. *Id.* at ¶ 1.

Atlantic Richfield's Response:

Undisputed.

5. Should Landowners prevail in the state court action, restoration would not begin before 2018, and likely would not begin until 2019 or later. Aff. Kane, Doc. 31 at ¶ 3.

Atlantic Richfield's Response:

Undisputed. Mr. Kane's affidavit is the first instance in which Landowners have offered a concrete estimate of when they plan to conduct their proposed alternative remediation activities. The fact asserted by Landowners, however, is immaterial to the issues before this Court.

6. In the state court action, ARCO raised affirmative defenses contending that CERCLA bars the Landowners' ability to recover restoration damages. Doc.15-9.

Atlantic Richfield's Response:

Disputed. Atlantic Richfield asserted an affirmative defense based on CERCLA generally and an affirmative defense based on CERCLA § 113(h) in particular. Neither defense, however, referenced "Landowners' ability to recover restoration damages." The fact asserted by Landowners, however, is immaterial to the issues before this Court.

7. ARCO and the Landowners have filed cross-motions for summary judgment in the state court action, which are currently pending, regarding whether Landowners' claim for restoration damages is a prohibited challenge to the EPA selected remedy pursuant to CERCLA §113(h). Doc. 15-3; Ex. 3, Pls.' MSJ Mot. & Br. re CERCLA (6/7/13).

Atlantic Richfield's Response:

Undisputed.

II. Atlantic Richfield's Additional Facts in Opposition to Landowners' Motion for Summary Judgment

1. Landowners suggest that Atlantic Richfield failed to perform planned cleanup work on certain Landowners' properties in the Spring of 2014 because the Montana state court dismissed Landowners' lawsuit, and that Atlantic Richfield

only re-offered to conduct the proposed work because the state court action was reinstated. This suggestion is misleading and demonstrably false.

As Landowners are aware, the cleanup work was not performed in the Spring of 2014 because EPA did not approve the Individual Site Work Plans (“ISWPs”) at that time. (*See* Ex. 1 to Henderson Aff., May 5, 2014 Ltr. from EPA to Atlantic Richfield.) Further, Atlantic Richfield notified the relevant Landowners on August 28, 2015—*before* the Montana Supreme Court issued its opinion—that it was resubmitting the ISWPs to EPA for approval, that Atlantic Richfield expected approval “within the next couple of months,” and that once EPA approved the plans, Atlantic Richfield would contact the Landowners again to schedule the cleanup work. (*See* Ex. 2 to Henderson Aff., Aug. 28, 2015 Ltr. from Atlantic Richfield to V. Douglas.) This is precisely what happened. (*See* Ex. 3 to Henderson Aff., Sept. 14, 2015 Ltr. from EPA to Atlantic Richfield approving the ISWPs.)

2. Landowners claim that their expert toxicologist, Richard Pleus, does not criticize EPA’s selected remedy for the Site because he focuses his expert report on a health-based risk assessment conducted by CDM Federal Programs Corp. (“CDM”) rather than by EPA. (Defs.’ Br. Supp. Mot. Summ. J. (Dkt. 34) at 20; Defs.’ Statement of Disputed Facts (Dkt. 37) at 7, 18.) This argument, too, is misleading. CDM is a contractor for EPA. The Baseline Human Health Risk

Assessment was conducted for and at the behest of EPA. (*See* Final Baseline Health and Human Risk Assessment, Ex. 6 to Kane Aff. (Dkt. 31-14), at 3 (“Prepared for: UNITED STATES ENVIRONMENTAL PROTECTION AGENCY”), and 19 (“CDM Federal Programs Corporation (CDM Federal) has been tasked by the U.S. Environmental Protection Agency (EPA), Region VIII to evaluate the potential for adverse human health effects to occur as the result of exposure to chemicals from ongoing and historic releases from the Anaconda Smelter National Priorities List (NPL) Site.”); CSOU ROD (Dkt. 31-10) at DS-44-DS-45 (explaining that EPA used the Final Baseline HHRA to establish the 250-ppm arsenic concentration soil action level for the Site).) In rejecting CDM’s findings, Dr. Pleus rejected EPA’s findings.

There is no dispute that Dr. Pleus explicitly criticizes and rejects the 250 ppm arsenic action level selected by EPA in the CSOU ROD. (*See* Ex. 4 to Henderson Aff., Pleus Suppl. Expert Rep., at 20 (“The key question that I have been asked to address is whether the action level of 250 ppm set for arsenic in residential soil at the Anaconda Smelter NPL Site was developed in a manner consistent with generally accepted risk assessment practices and is appropriately health protective. I conclude that ... the 250 ppm action level ... is not appropriately health protective.”).)

3. Just this week Landowners disclosed another expert, William Meggs, who, like Dr. Pleus, directly challenges EPA's selected remedy for the Site. (*See* Ex. 5 to Henderson Aff., Pls.' Supp. Expert Witness Disclosure, at 2, ¶ 3 (The "plan to remove only that soil which exceeds 250 parts per million arsenic and 400 parts per million lead does not sufficiently limit the risks posed to residents of Opportunity. Those levels are in excess of known human health standards.").)

4. Landowners assert that the Community Soils Operable Unit ("CSOU") record of decision ("ROD") does not require cleanup on a "yard-weighted-average" basis. (Defs.' Statement of Disputed Facts (Dkt. 37) at 7.) Landowners are incorrect. EPA's action levels are based on "an area-weighted average soil concentration composed of composite samples from specific yard components." (Expert Report of Joyce Tsuji (Dkt. 37-2) at 13; *see also* CSOU ROD (Dkt. 31-9) at DS-23 ("Numerous yards within each subarea were sampled and soil was collected from several locations within each yard, including play, house perimeter, garden, hardpack, and bare areas. Soil concentrations for arsenic and lead from all these samples *were averaged for each yard.*" (emphasis added))); CSOU ROD Am., Ex. 6 to Henderson Aff, at II-7 (describing the yards not remediated under the CSOU ROD as those "where the area weighted average arsenic concentrations for surface soils were less than 250 ppm").)

5. Finally, Landowners state that the arsenic concentration on the pastureland of one Landowner property exceeds EPA's action level of 1,000 ppm. (Defs.' Statement of Disputed Facts (Dkt. 37) at 12.) The property Landowners reference was owned by Rosemarie Silzly, a Plaintiff in the state case, but was sold by Ms. Silzly in 2015 and is no longer the subject of her claims in the state case. (See Ex. 7 to Henderson Aff., Soil Testing Map with Geocode; Ex. 8 to Henderson Aff., Silzly Supp. Disco. Resps.; Ex. 9 to Henderson Aff., Montana Cadastral Property Report.)

6. Atlantic Richfield incorporates by reference the facts contained in its Statement of Undisputed Facts in support of its Motion for Summary Judgment (Dkt. 23).

Dated this 6th day of May, 2016.

/s/ John P. Davis

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CERTIFICATE OF SERVICE

I hereby certify that on May 6th, 2016, a copy of the foregoing document was served on the following persons by the following means:

_____	Hand Delivery
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